2001

Arthur L. Murray v. Ogden City and The Standard Corporation : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

ARTHUR L. MURRAY,

Plaintiff and Appellant,

vs.

OGDEN CITY, a Municipal Corporation, and THE STANDARD CORPORATION, a Utah corporation,

Defendants and Respondents.

Case No. 14249

BRIEF OF RESPONDENT OGDEN CITY

Appeal from the Judgment of the
District Court of Weber County
Honorable John F. Wahlquist, Judge

KIM R. WILSON
WORSLEY, SNOW & CHRISTENSEN
7th Floor Continental Bank Bldg.
Salt Lake City, Utah 84101
Attorney for Respondent,
Ogden City

PETE N. VLAHOS
VLAHOS & KNOWLTON
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401
Attorney for Appellant

LEONARD H. RUSSON
HANSEN, WADSWORTH & RUSSON
702 Kearns Building
Salt Lake City, Utah 84101
Attorney for Respondent,
Standard Corporation

TABLE OF AUTHORITIES

CASE CITATIONS

STATUTES:

TABLE OF CONTENTS

IN THE SUPREME COURT OF THE

STATE OF UTAH

ARTHUR L. MURRAY, Plaintiff and Appellant, vs. OGDEN CITY, a Municipal Corporation, and THE STANDARD CORPORATION, a Utah Corporation, Defendants and Respondents.	:	Case No. 14249

BRIEF OF RESPONDENT
OGDEN CITY

STATEMENT OF KIND OF CASE

This is an action for personal injuries sustained by Appellant as he fell into a water meter manhole while traversing an Ogden City street. The Standard Corporation is the owner and occupier of the premises abutting the sidewalk area where the Appellant sustained injuries.

DISPOSITION IN LOWER COURT

The Lower Court granted Motions for Summary Judgment filed by both Respondents.

RELIEF SOUGHT ON APPEAL

Respondent prays that the Judgment be affirmed.

STATEMENT OF FACTS

On the evening of December 7, 1973, the Appellant, along with his wife and son, were traversing a sidewalk going West on 23rd Street in Ogden, Utah. (Dep. 10) At approximately 455 - 23rd Street, the Appellant stepped on a water meter cover (Dep. 16) whereupon the water meter cover slid away and the Appellant fell into the hole left vacant by the movement of the water meter cover (Dep. 18, 52). The Appellant claims no defect in the actual physical construction of the water meter cover or ring (Dep. 39, 51).

The Affidavits of James F. Robinson (R 49-50) and Howard E. Martin (R 51-52), both employees of Ogden City Water Department, show that there was no defect in the construction or condition of the water meter cover or ring and that when replaced, the cover fit snugly into the ring, flush with the sidewalk. The Affidavits of Mr. Robinson and Mr. Martin as well as Jerry Reed, Ogden City Director of Public Works (R 53-54), show that Ogden City had no knowledge of any unsafe condition concerning the subject water meter cover or ring or any knowledge of complaints about the cover or ring having been lodged with Ogden City.

ARGUMENT

POINT I

THE RECORD SHOWS NO GENUINE ISSUE OF FACT AS TO WHETHER RESPONDENT OGDEN CITY HAD ACTUAL OR CONSTRUCTIVE NOTICE OF THE TRANSITORY CONDITION, AND ABSENT SUCH NOTICE, RESPONDENT OGDEN CITY WAS NOT NEGLIGENT AS A MATTER OF LAW.

The record shows that the accident is not attributable to any actual physical defect in the construction of the water meter cover or ring. Appellant makes no claim to the contrary. The apparent contention of the Appellant is that the water meter cover was not seated in the ring at the time of the accident and slid away under the weight of the Appellants foot, allowing him to fall into the hole. The record shows that Respondent Ogden City and its agents did not know of the water meter cover being out of its ring or of any defect or unsafe condition concerning the water meter cover and ring (R 49-54).

The sole question on this appeal is whether there is a genuine issue of fact whether the Respondent Ogden City knew, or in the exercise of reasonable care, should have known of the condition of the water meter cover, and whether it had a reasonable opportunity to remedy it. Unless Appellant can show by the affidavits and deposition on file how long the condition was present, no genuine issue of fact exists as to whether Respondent Ogden City is charged with construc-

tive notice of the condition and whether it unreasonably failed to correct it, and the Judgment should therefore be affirmed.

Rule 56, Utah Rules of Civil Procedure, so far as here material, provides:

> "(c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law . . .
>
> "(e) . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." (emphasis added)

In Maloney vs. Salt Lake City, 1 Utah 2d 72, 262 P.2d 281, (1953), plaintiff was injured when a section of the city sidewalk collapsed. This Court affirmed judgment for defendant notwithstanding a verdict for plaintiff, on the ground there was no evidence that any defect existed in the sidewalk prior to the accident. In stating the elements necessary to find negligence on the part of the city, this Court said:

> "In order to support this claim, the evidence must show that for some period of time before the accident, the sidewalk which collapsed was in such condition, that it obviously presented a hazard to those

using it sufficient to give the city notice that there was a dangerously defective condition which it negligently failed to correct."

Failing that evidence, the Court was compelled to make a finding adverse to the plaintiff.

In Pollari vs. Salt Lake City, 111 Utah 25, 176 P.2d 111, (1947), plaintiff claimed injuries from a fall as a result of stepping in a hole in a city sidewalk. Plaintiff appealed from a jury verdict, no cause of action. One ground of appeal was that the trial court had committed prejudicial error in defining the standard of care required of a city in discovering defects in public sidewalks. The court's instruction was as follows:

"If you find from a preponderence of the evidence that the defects in the sidewalk at the place in question was of such a character as to constitute a hazard to pedestrians walking on such sidewalk while exercising due care for their own safety, and that said defect had existed for such a length of time that the defendant city, in the exercise of due care and their duty to maintain said sidewalk in a reasonably safe condition for pedestrian traffic, should have discovered the same and repaired it, . . . your verdict should be in favor of the plaintiff and against the defendant. . ."

This Court approved the instruction by stating:

"We think the instruction given by the Court substantially states the law as to the city's duty and, therefore, there is no merit in plaintiff's contention . . ."

The verdict was affirmed.

The well settled standard is that a municipality cannot be held liable for a defect in a sidewalk without a showing

of actual knowledge of the defect or its existence for such a period of time that the city had constructive notice of it. The early case of Kiesel & Company vs. Ogden City, 8 Utah 237, 30 P. 758, (1892) also stands for the proposition that actual or constructive notice of a condition is a condition precedent to a finding of negligence on the part of the city.

Appellant relies heavily on the case of Gordon vs. Provo City, 15 Utah2d 287, 391 P.2d 430, (1964), in his brief. The plaintiff suffered injuries when she stepped on a loose water meter cover. This Court sustained a verdict holding the city liable.

The rule enunciated in the Gordon case does not differ from those cited in the previous cases. To be held liable, the city must have either actual notice or constructive notice such that there was a reasonable opportunity to remedy the dangerous condition. Failing a showing of this, there could be no finding of negligence on the part of the city.

The verdict in the Gordon case was based on the fact that some short time before the plaintiff fell into the water meter hole, she saw employees of the city removing the cover. The Lower Court held that the city had notice of the lid being loose when its employees had in fact left it loose.

The facts of the Gordon case differ materially from those in the case at bar. Appellant has here failed to introduce into the record so much as a hint of evidence that

Respondent Ogden City had actual notice of any dangerous condition of the water meter cover and ring. He has introduced no evidence showing how long the condition existed prior to the accident. The record shows that the water meter hole had not been in use for a number of years (R 29) and thus there was no reason for agents of Ogden City to remove the cover. Appellant has failed to raise any material issue of fact tending to show negligence on the part of Ogden City.

Appellant directed a substantial portion of his brief to the question of whether this accident arose out of a governmental or proprietary function of government. His contention is that a city is liable for its negligence when engaged in proprietary or commercial activities and that the accident arose out of a proprietary activity.

Respondent Ogden City does not concede the point that the accident arose out of a proprietary function but asserts that it is not a material distinction insofar as this appeal is concerned because the standard for those engaged in commercial ventures is no different than that set out in the foregoing cases dealing with municipal governments.

There is a well established body of law from this Court dealing with the liability of merchants for transitory conditions. The concensus of the holdings of these cases is that liability cannot be imposed upon a merchant absent actual or constructive

notice of the condition.

In Hampton vs. Rowley, 10 Utah 2d 169, 350 P.2d 151, (1960), plaintiff brought an action for injuries sustained when he slipped on a rock on a step on defendant's premises. Plaintiff appealed from a directed verdict in favor of defendant. In affirming the judgment, the Court outlined the governing law as follows:

> "In regard to a transitory condition of the character here involved, the instruction given is consistent with well established law that in order to find the defendants negligent it must be shown that they either knew, or in the exercise of reasonable care, should have known, of any hazardous condition and had a reasonable opportunity to remedy the same."

In Lindsay vs. Eccles Hotel Company, 3 Utah 2d 364, 284 P.2d 477, (1955), plaintiff slipped on a small quantity of water which somehow got on the floor sometime after she was seated in defendant's coffee shop. This Court affirmed a directed verdict for defendant because:

> "There was no evidence as to how the water got onto the floor, by whom it was deposited, and exactly when it arrived there, or that the defendant had knowledge of its presence. Under such circumstances, a jury cannot be permitted to speculate that the defendant was negligent." (emphasis added)

In Howard vs. Auerbach Company, 20 Utah 2d 355, 437 P.2d 895, (1968) plaintiff received a fall allegedly caused by oil on an escalator. The Lower Court entered summary judgment and this Court affirmed on the following grounds:

> There is nothing in the record affirmatively or even controversally to show any negligence on the part of the store save an allegation to such effect and a denial thereof. The record is devoid of any indication who put any oil on the steps of the escalator or, if so, it was for such a time that the store people reasonably could have discovered and removed it."

In accordance with the foregoing decisions are Koer vs. Mayfair Markets, 19 Utah 2d 339, 431 P.2d 566, (1967), and Long vs. Smith Food King Store, ___ Utah 2d ___, 531 P.2d 316, (1973).

The most recent statement of this Court, Allen vs. Federated Dairy Farms, Inc. ___ Utah 2d ___, 538 P.2d 175, (1975), resisted urgings of the plaintiff to "liberalize" the rulings of the above cited cases. Justice Crockett stated:

> ". . . The correct policy is to accord fair and even handed justice to both by assuring to each the remedies and protections that the established rules of law give him; and when loss or injury occurs, to let it rest where it falls, unless it is affirmatively shown that another was at fault; and that that was the cause of the injury."

That is precisely what Respondent Ogden City urges is that each party be accorded the remedies and protections that the established rules of law give it. Appellant has failed to place into the record any evidence that Ogden City was at fault. Such failure of evidence under Rule 56, Utah Rules of Civil Procedure, compels the granting of summary judgment in favor of Ogden City.

POINT II

SUMMARY JUDGMENT IN FAVOR OF OGDEN CITY WAS A PROPER DISPOSITION OF THE CASE.

Rule 56, Utah Rules of Civil Procedure, as cited above, provides that when a Motion for Summary Judgment is made and supported as provided in the Rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response by affidavits or as otherwise provided in the Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment is to be entered against him.

Ogden City's Motion for Summary Judgment was appropriately made and affidavits were filed with the Court and served upon counsel. The affidavit of Howard E. Martin (R. 51-52) shows that he was called to the scene of the accident and found the water meter cover on the sidewalk. He replaced the cover into the ring flange and the cover fit snugly into the ring, flush with the sidewalk. He was puzzled how stepping on the cover would dislodge it, and after he replaced it, he physically attempted to loosen it with his feet and jumped up and down on it, but was unable to dislodge it. The affidavit of Mr. Martin as well as those or James F. Robinson (R. 49-50) and Jerry Reed (R. 53-54), all employees of Ogden City, state that none had personal knowledge of any defective condition of the water meter cover or ring prior to the occurrence.

They further state that they knew of no complaints of any defective condition prior to the occurrence. The first requirement of Rule 56 has therefore been met with the filing of the motion, properly supported.

The burden then falls upon Appellant, by affidavit or otherwise, to set forth specific facts showing that there is a genuine issue for trial. The affidavit of Appellant (R. 56-57) was filed in response to the Motion for Summary Judgment, but fails completely to raise any genuine material issue of fact.

There is no statement in Appellant's affidavit or his deposition, both of record, which shows or attempts to show that Respondent Ogden City or its agents knew of any defective condition of the water meter cover. There is no showing of the length of time which the condition existed prior to the accident. Appellant has failed to meet his burden and Summary Judgment was appropriate.

Without some showing of notice, the issue of Respondent's negligence would be open to pure speculation. The water meter cover could have been removed from its seat by unknown persons minutes before the occurrence. To hold Ogden City liable, given the facts of record, would be contrary to all authorities cited.

Appellant repeatedly contends that he is unable to raise questions of fact because he has not had opportunity

for discovery in this case. Rule 56, Utah Rules of Civil Procedure, provides in part:

> "(b). FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaritory judgment is sought, may, at any time, move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof."

The Rule makes no limitation on how long after commencement of a case, a Motion for Summary Judgment may be made by a defendant. Plaintiff filed his law suit May 29, 1974. The Motions for Summary Judgment were heard August 5, 1975-- over 15 months after the law suit was instituted. During those fifteen months, Appellant initiated no discovery procedings whatsoever towards Ogden City. Even the last ditch effort at discovery in the form of Requests for Admission, Interrogatories and for Production of Documents (R. 63-71) were not directed toward Ogden City. It should be noted for the record that the foregoing pleading was not filed with the Weber County Clerk until some hours after the Summary Judgment had been granted by the Court.

It should be further noted that on March 6, 1975, Appellant filed with the Court a Notice of Readiness for Trial signed by his counsel (R. 32). It reads in part:

> "You will please take notice that the undersigned, Pete N. Vlahos, attorney for the plaintiff, herewith certifies:
>
> > . . . 3. That such use of the rules of discovery as counsel feels necessary for the trial of this cause has been completed,

and that the case is at issue."

Appellant's claim that there was no opportunity for discovery against Ogden City is betrayed by the passage of time between the filing of the Complaint and the Motion for Summary Judgment, the fact that no discovery was directed to Ogden City throughout the pendency of the suit, and the certification of March 6, 1975, that use of discovery was complete and that the case was at issue.

The provision in the pretrial order extending discovery to within ten days of trial was made at the request of counsel for Respondents to enable them to obtain an independent medical examination of Appellant as near the trial as possible.

The case of Leininger vs. Stearns-Roger Manufacturing Company, 17 Utah 2d 37, 404 P.2d 33, (1965) characterized Summary Judgments as follows:

> . . .Summary Judgment is not a substitute for trial but is rather a judicial search for determining whether genuine issues exist as to material facts. Rule 56, Utah Rules of Civil Procedure, dictates the granting of Summary Judgment where there is no genuine issue of a material fact. The plaintiff in the instant case has attempted to create factual issues, but the whole purpose of Summary Judgment would be defeated if a case could be forced to trial by a mere assertion that an issue exists."

Summary judgment rules are designed to effect an inexpensive and expedicious determination of litigation and should be granted where no genuine issues of fact exist. Ulibarri vs. Christenson, 2 Utah 2d 367, 275 P.2d 170, (1954),

and Aetna Loan Company vs. Fidelity and Deposit Company of Maryland, 9 Utah 2d 412, 346 P.2d 1078, (1959).

CONCLUSION

There are no probitive facts in the affidavits or deposition before the Court to show how long the transitory condition concerning the water meter cover existed. In the absence thereof, there can be no genuine issue of fact as to whether Respondent Ogden City had a reasonable time to discover and correct it. Appellant has certainly had adequate time and opportunity to discover such facts. There is nothing contained in Appellant's counter affidavit filed after the hearing of the Motion for Summary Judgment, which showed how long the transitory condition existed.

The issue here is: Should Respondent Ogden City have discovered the condition. It cannot be said whether Respondent should have discovered it unless it is known how long the condition existed. The time element is missing and hence there is no probative basis for inference that Respondent unreasonably failed to discover it.

Respondent Ogden City respectfully submits that the Summary Judgment in its favor should be affirmed.

Respectfully submitted,

Kim R. Wilson
WORSLEY, SNOW & CHRISTENSEN
Seventh Floor, Continental Bank Bldg.
Salt Lake City, Utah 84101
Attorney for Respondent
Ogden City